

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1358

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1358

UNITED STATES OF AMERICA,

Appellee.

—v.—

ISIAH CRUTCH, LOUIS BAS, JR., and
EUGENE CRUTCH,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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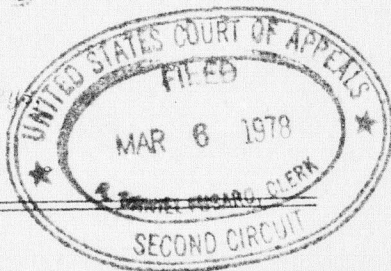


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UNITED STATES OF AMERICA,

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ISIAH CRUTCH, LOUIS BAS, JR., and
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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Isiah Crutch, Louis Bas, Jr., and Eugene Crutch appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on July 27 and September 7, 1977, after a two week trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 77 Cr. 246, filed April 19, 1977, charged Isiah Crutch, Louis Bas, Jr., Eugene Crutch, Leonard J. Caro, Hee Soo Kim and Elie Nicoleau in twenty-nine counts with violations of Title 18, United States Code, Sections 371, 1343, 2312, and 2314.* Count One charged all six defendants with conspiracy to commit fraud by

* That indictment superseded an earlier indictment filed April 7, 1977 which was identical in all respects except that the defendant Nicoleau was charged as "John Doe a/k/a Eli Niccolo."

wire, to transport fraudulently obtained merchandise interstate, to transport fraudulently obtained motor vehicles interstate, and to transport forged and counterfeited securities interstate. Counts Two through Twenty-Nine charged various defendants with substantive violations of 18 U.S.C. §§ 1343, 2312 and 2314. Defendants Isiah Crutch and Bas were named in all counts; Eugene Crutch was named in Count 29 only; Caro was named in Counts 15, 16 and 24; Kim was named in Counts 11, 25, and 27; and Nicoleau was named in Count 28 only.

Trial commenced against Isiah Crutch, Bas, Eugene Crutch and Nicoleau on June 20, 1977 and concluded on July 1, 1977.* The jury found as follows: Isiah Crutch guilty on Counts 1-27 and not guilty on Counts 28 and 29; Bas guilty on Counts 1, 15, 16, 17, 25, 26, 27, and not guilty on Counts 2-14, 18-24, 28-29; Eugene Crutch guilty on Counts 1 and 29; Nicoleau not guilty on Counts 1 and 28.

On July 27, 1977, Judge Carter sentenced Bas to concurrent terms of five years' imprisonment on all counts. On September 7, 1977, Isiah Crutch was sentenced to terms of imprisonment totalling ten years** and Eugene Crutch was sentenced to concurrent terms of two years' imprisonment.

* Prior to trial Caro entered a plea of guilty to Count 16 and received a sentence of three months' imprisonment followed by twenty-one months' probation. Kim entered a plea of guilty to Count 25 and was placed on two years' probation.

** Isiah Crutch was sentenced to a term of five years' imprisonment on Count 1, to concurrent terms of one year's imprisonment on Counts 2, 3, 7, 9, 10, 12, 14, 16, 20, 21, 25, and 27 to run concurrently with the sentence imposed on Count 1, and to concurrent terms of five years' imprisonment on Counts 4, 5, 6, 8, 11, 13, 15, 17, 18, 19, 22, 23, 24, and 26, to run consecutively to the sentence imposed on Count 1.

Bas and Eugene Crutch are at liberty pending appeal. Isiah Crutch is now serving the sentence imposed.

Statement of Facts

The Government's Case

1. A Brief Synopsis

The Government's proof at trial established that in early 1975, Isiah Crutch * formed an organization of individuals who manufactured and passed counterfeit checks. The checks were printed by Louis Bas, Jr., a commercial printer located in Brooklyn. They were thereafter distributed by other members of Crutch's organization, including Suzan Abbott, Jerold Heitzner, Leonard Caro, Hee Soo Kim, Eugene Crutch, Elie Nicoleau, and Lloyd Williams. The checks were put to several uses. They were used to open bank accounts from which withdrawals were later made. They were also used to purchase vast quantities of merchandise, including gold coins, Polaroid cameras, and six automobiles, including one Rolls Royce, three Mercedes Benzes, one Cadillac, and one Lincoln Continental. Finally, the checks were also sold in wholesale quantities to others. In one transaction, Crutch sold 100 counterfeit Bankers Trust Company official checks with an aggregate face value of \$1,750,000.

2. Crutch Forms An Organization

In late 1974 Isiah Crutch began to recruit others to assist him in the distribution of counterfeit checks. Abbott and Heitzner were the first of those recruited.

* Isiah Crutch will hereafter be referred to as "Crutch"; Eugene Crutch will be referred to by his full name.

Abbott opened accounts at two banks in New York, the Banco de Ponce and the Amalgamated Bank, and later deposited counterfeit checks in these accounts. (Tr. 100-03).^{*} Heitzner was first assigned to receive packages of gold coins that had been purchased with counterfeit checks. (Tr. 746-47). From these minor errands, the members of the group proceeded to the more sophisticated schemes described hereafter.

Crutch obtained the counterfeit checks from Louis Bas, Jr., a printer located at 988 Winthrop Street in Brooklyn. Crutch designed the checks, then gave the designs to Bas, who made up a negative. Crutch then examined the negative and, if he deemed it satisfactory, directed Bas to manufacture copies from it. (Tr. 568-72).

Crutch communicated with his associates by means of a paging system or "beeper." This device was rented to Crutch by Lin Communications, located on Madison Avenue in New York City. Lin assigned Crutch a call number, C-440, and anyone wishing to contact Crutch called Lin and left a message for that number. Lin then paged Crutch on the receiving device he carried with him at all times and notified him of the message. Crutch gave most of his associates code names to use when leaving messages instead of their own names: Abbott was "C-1"; Heitzner was "JJ". (Tr. 257-60, 731-39).

3. The Security National Rare Coin Company**

In March, 1975, Heitzner rented office space at 10 East 39th Street in the name of a fictitious corporation

^{*} "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to the brief of the indicated appellant.

^{**} This transaction is the subject of Counts 2-6.

called Lew Williams and Associates. On March 19, 1975, Abbott, at Crutch's direction, placed a telephone call to the Security National Rare Coin Company in San Antonio, Texas. She represented herself as Suzan Swan, a secretary for Lew Williams and Associates, and inquired into the prices for various gold coins. Abbott called the coin company again on the two following days, March 20 and 21, and placed orders for a total of \$25,590 in coins.

Crutch and Abbott then sent to the coin company a counterfeit certified check for \$25,590 drawn on the account of Lew Williams and Associates at the Marine Midland Bank. The coin company received the check on March 24, 1975 and on the following day gave approximately \$18,000 in coins to a messenger for delivery to New York. The messenger flew to Kennedy Airport, where he was met by Heitzner. Heitzner signed for the coins and then delivered them to Crutch and Abbott, who were waiting in an airport parking lot. The coin company delivered the balance of the coins, approximately \$7,000, to a messenger on the following day, March 26. The messenger once again delivered the coins to Heitzner, who turned them over to Crutch and Abbott.

Crutch later sold the coins and paid Heitzner \$2,500 for his services. (Tr. 103-13, 593-98, 748-51).

4. The Continental Coin Company *

In April, 1975, Abbott and Heitzner rented office space at Two Penn Plaza in New York City in the name of the Hilton Investment Corporation. On April 14, 1975, Abbott, at Crutch's direction, placed a telephone call

* This transaction is the subject of Counts 7 and 8.

to the Continental Coin Company in Minneapolis, Minnesota. She represented herself as Elaine Goldstein, a vice-president of Hilton Investment, and placed an order for \$65,521.25 in gold coins.

In the following week, Abbott arranged to have a check sent to the coin company by Brinks messenger and to have the coins returned to New York City by the same means. On April 28, 1975, Brinks delivered to the coin company a counterfeit check for \$65,521.25 drawn on the account of the Hilton Investment Corporation at the First National Bank of Chicago. Before releasing the coins, the coin company consulted with the First National Bank of Chicago and learned that the check was counterfeit. The FBI was then notified.

The New York office of Brinks then advised Abbott, who had called repeatedly to inquire after the delivery of the coins, that a representative from Hilton Investment was required to come to the Brinks office to sign a delivery contract. On May 1, 1975, Crutch, Abbott and Heitzner met at Crutch's apartment and Crutch instructed Heitzner to go to Brinks to sign the contract. Shortly after Heitzner arrived at the Brinks office he was arrested by agents of the FBI. (Tr. 113-26, 599-606, 751-52, 759-63).

5. Leonard Yaseen's Mercedes Benz *

Leonard Yaseen, a resident of Larchmont, New York, placed an advertisement in the May 18, 1975 *New York Times* for the sale of his automobile, a 1973 Mercedes Benz 450 SEL. Crutch saw the advertisement and told Abbott to call Yaseen. She called him on May 18, introduced herself as Elonda D'Auria, and arranged to visit him and to inspect the car that same day. Abbott arrived

* This transaction is the subject of Count 9.

in Larchmont by chauffeured limousine, met Yaseen, and took the car for a test drive.

Two days later, Abbott called Yaseen and informed him that she would buy the car. Yaseen was asked to accept a cashier's check and agreed. Crutch then gave Abbott a counterfeit cashier's check drawn on the Barclays Bank of New York in the amount of \$12,500. Abbott traveled to Larchmont by limousine, gave Yaseen the check, and took possession of the car.

On May 28, 1975, Abbott, Crutch, and Heitzner traveled to Prestige Motors in Paramus, New Jersey. There Abbott sold Yaseen's Mercedes for \$10,500. She received a check for that amount from Prestige Motors and cashed it immediately at a nearby bank. She then gave the \$10,500 to Crutch. (Tr. 126-35, 708-10).

6. Ramon Arenas' Hasselblad *

Ramon Arenas, a resident of Morristown, New Jersey, placed a newspaper advertisement on May 31, 1975 to sell his Hasselblad camera. On that day, Heitzner called Arenas in Morristown, identified himself as Raleigh Davenport, a New York lawyer, and offered to buy the camera. Arenas agreed to sell it for \$1,395.

Heitzner then visited Crutch in the latter's apartment at 67 East 11th Street in Manhattan. He explained to Crutch that he had arranged to purchase the camera, and Crutch gave him a blank counterfeit check drawn on the account of Raleigh L. Davenport at the Manufacturers Hanover Trust Company. Heitzner signed Davenport's name to the check and Crutch then stamped it with a bogus Manufacturers Hanover certification stamp.

* This transaction is the subject of Counts 10 and 11.

Heitzner traveled to Morristown that same day and obtained the camera from Arenas. He then returned to Crutch's apartment and gave Crutch the camera. Crutch paid Heitzner \$300 for his role in this transaction. (Tr. 135-36, 763-67, 1001-03).

7. Samuel Higginbottom's Mercedes Benz *

On June 8, 1975, Samuel Higginbottom, a resident of Greenwich, Connecticut, placed an advertisement in the *New York Times* to sell his 1974 Mercedes Benz 450 SL. On June 15, 1975, Abbott called Higginbottom in Greenwich. She identified herself as Katrina Walters and asked to inspect the automobile. Higginbottom invited her to his home that same day. Abbott then traveled to Greenwich, gave the car a test drive, and stated that she wished to buy it.

On the following day, June 16, Abbott obtained from Crutch a counterfeit Barclays Bank cashier's check in the amount of \$13,500. She traveled to Greenwich by chauffeured limousine and obtained the car from Higginbottom in exchange for the check.

On June 25, Abbott and Crutch drove the Mercedes to a dealer called Benzel-Busch located in Englewood Cliffs, New Jersey. Abbott there sold the automobile for \$11,200 and obtained a check which she cashed immediately at a nearby bank. She then turned the money over to Crutch. (Tr. 134-41, 168-73, 700-03).

8. The Opening of Bank Accounts in Park Ridge, Illinois**

On July 8, 1975 Heitzner and Hee Soo Kim, another Crutch associate, flew from New York to Park Ridge,

* This transaction is the subject of Counts 12-14.

** This transaction is the subject of Counts 18 and 19.

Illinois, a suburb of Chicago. They entered the Citizen's National Bank in Park Ridge and opened accounts in fictitious names. Heitzner opened an account in the name Bernard Kantor, and Miss Kim opened an account in the name Bette A. Lang. Each deposited in his or her account a counterfeit check supplied by Crutch. Heitzner deposited a check payable to Bernard Kantor in the amount of \$12,550 drawn on the account of Prestige Motors, Inc. at the People's Trust of New Jersey. Kim deposited a counterfeit Barclays Bank cashiers check payable to Bette A. Lang in the amount of \$14,607.13. Although Crutch had planned to draw on the balances in these accounts which these checks created, the bank detected the counterfeiting before any withdrawals could be made. (Tr. 768-72, 1029-30).

9. Richard Slobodien's Mercedes Benz*

The first assignment Crutch gave Leonard Caro was the purchase of a Mercedes Benz 450 SL from Richard Slobodien in Fairfield, New Jersey. On July 22, 1975, Crutch hired a chauffeured limousine for Caro and gave him a drivers license and other identification in the name of Edward Baker. Caro drove to Fairfield and visited Slobodien at his place of business, Apollo Distributors. Caro introduced himself as Edward Baker, inspected the car, and discussed price with Slobodien. He then returned to New York.

On the following day, July 23, Crutch instructed Caro to go to New Jersey and purchase the car. He ordered a limousine for Caro and handed him an envelope containing a counterfeit cashier's check drawn on the Bankers Trust Company in the amount of \$14,000. Caro drove to New Jersey, handed Slobodien the check, and took possession of the car. He drove it back to New York and parked it in a garage on Broadway and 12th Street, near Crutch's apartment.

* This transaction is the subject of Counts 15 and 16.

On July 24, Abbott, at Crutch's instruction, called Schane Motors, a Manhattan automobile dealer, and inquired about selling the Mercedes. When the dealer expressed interest, Crutch instructed her to go to Schane Motors and to sell the car. Abbott took the car to Schane Motors and, after brief negotiations with salesmen there, was arrested by New York City policemen. (Tr. 173-77, 491-501).

10. The sale of \$1,750,000 of Bankers Trust Checks *

In July, 1975, Stephen Rowe, a paid informant for the FBI, was asked by an acquaintance, Michael Zilberberg, if he was interested in investing in stolen American Express Traveler's checks. Rowe contacted Leonard Eisenberg, an attorney whom he knew, and asked if he would be interested in this scheme. Eisenberg, who was Crutch's lawyer, arranged a meeting between himself, Crutch, Rowe, and Zilberberg.

On the evening of July 24, 1975, the four men met at the Fifth Season, a massage parlor located at 315 West 57th Street in Manhattan. At this meeting, they quickly rejected the traveler's check proposal because of the size of the initial investment required. Crutch and Zilberberg, however, discussed the possible sale of a large quantity of counterfeit checks to be supplied by Crutch.

Crutch, Eisenberg, Rowe, and Zilberberg met again at the Fifth Season one week later. Crutch brought with him samples of various checks, including Barclays and Bankers Trust, which he spread out on a pinball machine for Zilberberg's examination. Zilberberg then agreed to purchase 100 Bankers Trust Company official checks, 25 each in denominations of \$10,000, \$15,000,

* This transaction is the subject of Count 17.

\$20,000, and \$25,000. In exchange he was to give Crutch a quantity of genuine cashier's checks stolen from the National Bank of North America.

At a final meeting at the Fifth Season the following week, Crutch gave Zilberberg the 100 Bankers Trust Company checks and Zilberberg gave him the National Bank of North America checks in exchange.

From Zilberberg the checks were passed on to Steven Korsen, who eventually arranged to sell 90 of the checks to Joseph Yablonsky, an undercover FBI agent, for \$525,000. On August 29, 1975, Korsen was arrested at a Washington, D.C. bank shortly after he had transferred the checks to Yablonsky. (Tr. 630-36, 641-50, 687-96).*

11. The Polaroid SX-70 Cameras**

On August 29, 1975, Abbott, at Crutch's direction, placed a telephone call to the offices of the Polaroid Corporation in Paramus, New Jersey. She identified herself as Mrs. Dresden, an employee of the International Monetary Exchange, and inquired into the price of SX-70 cameras. On the following day, Abbott called again and ordered 250 cameras at a total price of \$33,000.

Abbott then made arrangements for Broser Bros., a moving company, to deliver a check to the Polaroid offices in New Jersey and to bring the 250 cameras back to New York. On September 4, 1975, a counterfeit cashier's check in the amount of \$33,000 drawn on the Barclays Bank was left at 1160 Fifth Avenue, where Heitzner had

* The checks purchased by Yablonsky were examined by the FBI laboratory for latent fingerprints. Two of the checks (GX 34 and 78) and three yellow slips of paper accompanying the checks (GX 114) were found to bear latent fingerprints of Isiah Crutch. (Tr. 1038-55).

** This transaction is the subject of Counts 20-24.

rented office space. The movers picked up the check from the doorman of that building, drove to New Jersey, obtained the cameras, and brought them back to 1160 Fifth Avenue. When the movers returned to 1160 Fifth Avenue, Heitzner and Caro instructed them to place the cameras in the office Heitzner had rented. Crutch later sold the cameras to a camera store in New York City.

On September 8, 1975, Abbott again called the Polaroid office in New Jersey. Again identifying herself as Mrs. Dresden, she placed an order for 150 SX-70 cameras at a cost of \$19,800.

Polaroid employees had by this time been advised that the first check tendered in payment was counterfeit. The police were accordingly notified when Abbott placed the second order. On September 9, the Broser Bros. movers transported a counterfeit Barclays Bank cashier's check for \$19,800 to Polaroid. They were, however, given empty boxes in return. Heitzner was arrested by New York City policemen when he attempted to supervise the unloading of these boxes at an office he had rented near 43rd Street and Eighth Avenue in Manhattan. (Tr. 181-92, 512-22, 623-27, 772-75).

12. Milton Rusonik's Rolls Royce *

In early September, 1975, Crutch located an advertisement for the sale of a Rolls Royce. At the direction of Crutch and Abbott, Hee Soo Kim placed a telephone call to the owner, Milton Rusonik, a lawyer who lived in Ontario. She introduced herself as Eva Kai and agreed to purchase the automobile for \$45,150. She informed Rusonik that her chauffeur would fly to Canada and pick up the car.

* This transaction is the subject of Counts 25-27.

Abbott then obtained the services of a chauffeur, Patrick Rio. On September 6, Abbott sent to Rio an envelope containing cash for an airplane ticket to Toronto and a counterfeit Bankers Trust Company cashier's check payable to Rusonik in the amount of \$45,150. Rio flew to Canada that same day, obtained the automobile, and drove it back to New York that night. In accordance with his instructions, he left the car in a garage near 57th Street and Second Avenue. The following day Heitzner, at Crutch's direction, moved the car to a garage near the Pierre Hotel.* (Tr. 194-204, 713-19, 775).

13. Crutch Goes to Jail

On October 3, 1975, Crutch was incarcerated.** On the preceding evening, he gave Abbott detailed instructions concerning the preparation of counterfeit checks. He gave her quantities of blank checks drawn on different banks and instructed her to place them in a safe deposit box. He also gave her and instructed her in the use of a "paymaster", a machine used for filling out checks. He also gave her a supply of bogus certification stamps and instructed her in their use.

Later that week Abbott rented a safe deposit box at a branch of the Irving Trust Company located on Park Avenue. She placed the checks, certification stamps, and a quantity of false identification cards in this box. (Tr. 204-07).

* When he later encountered problems in disposing of the car, Crutch arranged for its return to Rusonik.

** In August, 1975, Crutch was tried and convicted of mail fraud in the Southern District of New York. He was remanded to custody on October 3, 1975, the day sentence was imposed.

14. Michael Kalimian's Cadillac *

Despite his incarceration, Crutch continued to supervise the activities of his organization. Abbott visited him frequently at the federal prison in Allenwood, Pennsylvania, and during these visits he suggested new schemes for making money. During this period Abbott also found it necessary to recruit new members for the organization. One whose services she obtained was Elie Nicoleau, whom she had known for several years.

Nicoleau began to search the automobile advertisements in newspapers for suitable targets. He located an ad in the November 16, 1975 *New York Times* for the sale of a Cadillac. On November 18, he brought it to Abbott's attention and, at her direction, he called the owner, Michael Kalimian. Nicoleau made an appointment to inspect the car and on that same day visited Kalimian at his apartment, located at 500 East 83rd Street.

After Nicoleau informed Abbott that the car was in satisfactory condition, Abbott removed a counterfeit Barclays Bank cashier's check from the safe deposit box and gave it to him. On November 19 he returned to Kalimian's apartment to purchase the car. He encountered some difficulty, however, when Kalimian refused to relinquish his license plates. He thereafter called Abbott, who summoned Eugene Crutch, Isiah's cousin, to assist him. The two men then drove the car to a Manhattan garage.

* This transaction is the subject of Count 28.

In mid-December Abbott hired a chauffeur to drive to Baltimore, Maryland and sell the car. In Baltimore the car was identified as stolen before it could be sold. (Tr. 208-19, 233-40, 263-69, 607-14).

15. Daniel Henderson's Continental *

In December, 1975 Daniel Henderson placed an advertisement in a newspaper for the sale of his 1975 Lincoln Continental. The ad came to the attention of Eugene Crutch, and he recruited Lloyd Williams, whom he had recently met in a Manhattan bar, to assist him in obtaining the car.

Eugene Crutch told Williams to call Henderson and to make an appointment to see the car. Williams did so, identifying himself to Henderson as Robert Walker. On December 22, 1975, Williams visited Henderson at his residence, near 152nd Street and Broadway in Manhattan, and examined the car. Williams then informed Eugene Crutch that the car was in satisfactory condition.

Eugene Crutch visited Abbott at her apartment in Manhattan and informed her that he needed a check in order to purchase an automobile. Abbott had a counterfeit Barclays Bank cashier's check in the apartment and gave it to Eugene Crutch. They used a typewriter and the paymaster to fill in the payee's name and the amount, \$9,850.

On December 24, 1975, Eugene Crutch gave Williams the Barclays check. Williams visited Henderson later that day, took possession of the car, and drove it to a point in Manhattan where Eugene Crutch met him.

Eugene Crutch and Williams then attempted to dispose of the car. On December 31, 1975 Eugene Crutch

* This transaction is the subject of Count 29.

and Williams drove the car to Newark, New Jersey. Williams entered an automobile dealership and attempted to sell the car. The dealer notified the Newark police, whose computer identified the car as stolen. The police located Eugene Crutch and Williams in the car several blocks from the dealership. After a chase of several blocks the Continental was overtaken and Eugene Crutch and Williams were arrested. (Tr. 252-57, 822-37, 853-55, 856-59, 895-900).

16. Abbott Meets the Printer

In February, 1976, Abbott was summoned before a grand jury in the Southern District of New York. She needed to raise money to hire a lawyer and discussed with Crutch, still incarcerated at Allenwood, how this could be accomplished. Crutch decided to reveal the identity of the check printer to Abbott and to put her in contact with him. He told Abbott how to locate Bas' printing shop in Brooklyn, and told her that if she said that she was "sent by Ike" he would trust her.

Abbott called Bas, introduced herself as "Ike's woman" and told him that Crutch was in trouble and needed his help. Bas invited her to meet him at his shop, located at 988 Winthrop Street in Brooklyn. At this meeting, Abbott embarked on a discussion of the crimes committed during the preceding year in order to establish with Bas her knowledge of Crutch's activities. Bas told Abbott how he had come to meet Crutch. He stated that Crutch had walked into his shop one day and ordered some material printed. Bas grew fond of Crutch and a bond developed between them. Eventually, Crutch "started giving him things that were a little funny but he didn't ask any questions and he just went ahead and made them." (Tr. 393). At this meeting Bas also showed Abbott how checks were printed.

At this first meeting Abbott also gave Bas a xerox copy of a check from the account of Catherine Marstairs at the Morgan Guaranty Trust Company. Bas agreed to print checks on that account for her.

Bas called Abbott when the checks were completed and the two met at an Italian restaurant in Manhattan. At this meeting, Bas gave Abbott a packet of approximately twenty checks on the Marstairs account at Morgan Guaranty. He did not give her a receipt or an invoice at this time, and she did not pay him anything.

Within the next few days, Abbott used one of the Marstairs checks to purchase 3,000 pounds sterling from Morgan Guaranty. She then conferred with Crutch by telephone as to how the money should be divided. Crutch directed her to set aside 20% for legal fees and 25% for two men who had assisted her in defrauding the bank, and to pay \$500 to Bas.

Abbott then arranged to meet Bas again at the Italian restaurant. They met outside the restaurant and then went to Bas' car, where Abbott gave him \$500 in cash. Bas did not give her a receipt for the money.

During one of his subsequent meetings with Abbott, Bas showed her a dollar bill he had printed that was an extremely close likeness of legitimate currency. Bas told Abbott that he was interested in finding someone who could supply him with the proper paper for making counterfeit currency. (Tr. 241-52, 386-98, 409-28).

17. The Search of Abbott's Safe Deposit Box

Abbott was arrested and indicted in May, 1976. In that same month she pleaded guilty in the Southern District of New York and in August 1976 received a sentence of three years' imprisonment. She began cooperating with the United States Attorney's Office in

December, 1976. In February, 1977, her lawyer turned over to the FBI the key to her safe deposit box.

On February 4, 1977, FBI Agent Edward Hughes conducted a search of the safe deposit box. In the box he found over 300 counterfeit checks drawn on various banks, including Manufacturers Hanover, Barclays Bank of New York, Barclays Bank of California, Morgan Guaranty, Bankers Trust, First National City, Marine Midland, National Bank of North America, City National Bank of New Jersey, and a non-existent bank entitled the "Fidelity Guarantee Trust Company of New York." Among the items found were counterfeit Bankers Trust Company cashier's checks and Barclays Bank cashier's checks of the sort used in many of the transactions directed by Crutch. Also found in the box were one genuine Barclays Bank cashier's check and one genuine Bankers Trust Company official check. Hughes also found in the safe deposit box a wallet containing numerous drivers licenses, credit cards, and identification cards. Among the names on the cards were Katrina Walters, Bernard Kantor, Edward Baker, and Bette A. Lang.

All of the items in the safe deposit box were examined by the FBI laboratory for latent fingerprints. Two latent fingerprints of Bas were found on an envelope. One latent fingerprint of Eugene Crutch was found on a drivers license. Twenty three latent fingerprints of Isiah Crutch were found on ten different items, including the genuine Barclays Bank cashier's check. (Tr. 260, 944-64, 1064-81, 1098-1114).

18. The Arrest of Bas

Bas was arrested on April 12, 1977 in his shop, 988 Winthrop Street. He was advised of his rights by the arresting agents and agreed to answer their questions. During the interview at his shop, Bas was first asked

if he knew Isiah Crutch; he said he did not. He was then shown a photograph of Crutch and stated that the man was known to him as Robert McPherson. Bas stated that McPherson had come to him approximately two years earlier, had identified himself as a company president, and had ordered printing from him. Bas stated that he had printed various items for McPherson, and had printed only a small number of checks.

Bas permitted the agents to search his shop for evidence of his dealings with Crutch. Although Bas did maintain alphabetical records of his customer accounts, no records were found reflecting transactions with Crutch or McPherson. An agent did locate a card containing the name "Robert McPherson" and a telephone number on a rotary card file.

Bas was then taken to the New York FBI office, where he was questioned about the checks removed from Abbott's safe deposit box. Bas recognized certain Manufacturers Hanover checks and stated that he had printed these; he also stated that the Barclays cashier's checks were familiar because of the paper used and the Barclays insignia. Bas stated that he did not recognize the Bankers Trust checks, nor did he recall printing any checks from that bank.

Prior to his arraignment Bas was also interviewed in the United States Attorney's office. He insisted that he knew Crutch only by the name McPherson, and had never heard the names "Crutch" or "Ike." He stated that he printed very small quantities of checks for McPherson, ranging from 5 to 15 copies of each. He stated that he had never printed checks in this manner for anyone else, and that the smallest check order other than McPherson's he had printed was 500 checks. He stated that to the best of his knowledge, he had never printed cashier's checks for McPherson. Bas admitted that he called McPherson regularly on his "beeper", but

could not remember the code name McPherson had assigned to him.

The Defense Case

1. Isiah Crutch

Isiah Crutch offered no evidence.

2. Louis Bas, Jr.

Bas testified in his own defense. He stated that he met Isiah Crutch in September, 1974, when Crutch walked into his shop. Crutch asked Bas to print personal checks for him, as well as envelopes and stationery. Bas agreed and quoted a price. Crutch told Bas that he had no office or telephone, because he was "out in the field a lot", and that he could only be reached through an answering service.

Crutch placed further orders for envelopes, checks, and stationery with Bas. Among the companies for which Bas did printing were Lew Williams and Associates and the Hilton Investment Corporation. After several such orders, Bas came to the conclusion that Crutch was a printing salesman, even though Crutch never explicitly identified himself as such. Crutch always paid Bas in cash, and never asked for or received receipts or invoices.

In December, 1974, Crutch asked Bas if he was interested in printing bank checks or cashier's checks. He told Bas that he was trying to assemble a portfolio of checks to present to various banks in order to obtain printing contracts from them. Bas eventually printed five different bank checks in all, including checks for Barclays and Bankers Trust. Crutch asked for only six or seven copies of each, but Bas persuaded him that one hundred

checks could be printed as cheaply as a few. Thus Bas printed one hundred copies of each bank check for Crutch.

In February, 1976 Bas received a telephone call from Abbott. When she visited Bas she gave him xerox copies of six personal checks of which she requested copies. At later meetings at the shop Bas explained to Abbott how checks were printed and how they were encoded with magnetic ink in order to pass through the bank's computers. Bas also showed Abbott a proof copy of a \$20 bill he had printed as a "souvenir."

At subsequent meetings with Abbott Bas gave her the six sets of checks she had ordered and Abbott paid him \$500 in cash. Abbott also informed Bas that Crutch was in jail on "trumped-up charges" and that money was needed for legal fees. She asked Bas if he would be able to print \$20 bills for her, but he refused.

Bas admitted that he had lied to the FBI after his arrest on April 12, 1977, when he stated that he could not remember printing Bankers Trust Company checks. His lie was prompted by his concern that he was being accused of counterfeiting checks. (Tr. 1243-1307).

On cross-examination, Bas admitted that he had no records whatever of his transactions with Crutch in his shop. He conceded that this was not his "normal way of doing business" (Tr. 1322) and that he did retain files and invoices for his other customers. Bas conceded that when he was interviewed in the United States Attorney's office he stated that he never printed cashier's checks for Crutch. He claimed that he gave that answer because he did not know what a cashier's check was.

Bas admitted calling Crutch regularly on his "beeper", and stated that Crutch had assigned him the code name "PX." (Tr. 1308-78).

3. Eugene Crutch

Eugene Crutch did not testify. He called in his behalf Theodore J. Mellor, the Newark detective who had arrested him and Lloyd Williams on December 31, 1975.* Mellor stated that when he arrested Williams, he found on his person a counterfeit drivers license in the name of Robert Walker. (Tr. 1193-1202).

Eugene Crutch also proved, pursuant to stipulation, that on December 30, 1975, Williams, using the name Robert Walker, had negotiated with a Newark automobile dealer for the sale of the Continental. On December 31, the dealer agreed to pay Williams \$7,200 for the car and was about to travel to a bank to withdraw that sum when he learned from the New Jersey Department of Motor Vehicles that the car was stolen. (Tr. 1393-95).

Government's Rebuttal Case

James Spry, the plant manager for DeLuxe Check Printers in West Caldwell, New Jersey, stated that DeLuxe printed checks for all of the major banks in New York City. Orders for the printing of checks were submitted to DeLuxe only on preprinted order forms. Typical charges were \$2.80 for 200 personal checks and \$30 for 500 cashier's checks.

Spry testified that DeLuxe frequently prepared sample checks in order to solicit business from banks. All such checks were stamped "proof", "sample", "void", or "specimen" over the signature line so they could not be signed or negotiated. (Tr. 1397-1401).

* Mellor had also testified as a Government witness.

A R G U M E N T

POINT I

Judge Carter's Refusal to Delay the Commencement of Trial Did Not Deprive Isiah Crutch of His Sixth Amendment Right to Counsel.

Isiah Crutch's sole argument on appeal is that he was deprived of his Sixth Amendment right to counsel by Judge Carter's refusal to delay the start of the trial.

This argument must be placed in its factual setting. The first indictment in this case was filed on April 7, 1977 and was sealed that same day. It was unsealed on April 12, 1977, when all defendants except Isiah Crutch were arrested. On April 14, 1977, all defendants except Isiah Crutch pleaded not guilty and the case was assigned to Judge Carter.* On April 14, 1977, the Government filed an affidavit for a writ of *habeas corpus ad prosequendum* for Crutch, who was incarcerated in Leavenworth, Kansas. The writ was made returnable April 21, 1977, the date fixed by Judge Carter for a pretrial conference. The United States Marshal failed to produce Crutch on April 21, and he arrived in the Southern District of New York on April 24. (See docket sheet, reprinted in Appendix of Defendant Isiah Crutch, Exhibit A).

Prior to the April 21 pretrial conference Leonard Levenson was appointed to be counsel for Crutch. He appeared on Crutch's behalf at the pretrial conference.**

* The Government was unable to secure a writ of *habeas corpus ad prosequendum* for Crutch while the indictment was under seal. The unsealing on April 12 did not give the Marshal sufficient time to produce Crutch pursuant to a writ by April 14, the scheduled day of arraignment.

** Crutch's brief on appeal states twice that no lawyer representing him appeared at this conference. (Br. 3, 16). Those statements are incorrect.

(Tr. of April 21, 1977 at p. 11). It was understood by Mr. Levenson that Crutch had not yet made the necessary showing of indigency that would have entitled him to court appointed counsel. (*Id.*). At the direction of the Court, Levenson agreed to interview Crutch as soon as he arrived in New York and to report to the Court whether Crutch wished to retain counsel or to accept Levenson as his court appointed lawyer. (*Id.* at 25). At that conference Judge Carter fixed June 20, 1977 as the date for commencement of trial. This date was reached only after extensive discussion among the trial judge and counsel for the six defendants. (*Id.* at 13-29). Judge Carter stated, with regard to the June 20 starting date, "Now there will be no, and I repeat no, changes". (*Id.* at 15). Levenson offered no objection to the date set.

After Crutch arrived in New York he met with Levenson. Levenson did not advise the trial judge that Crutch wished to retain counsel, and proceeded to do considerable work on Crutch's behalf, including filing an extensive motion for the dismissal of the indictment and obtaining discovery material from the prosecutor. During the week of June 13, 1977, Levenson informed Judge Carter that Crutch would be retaining one Rivers as counsel. Judge Carter set a conference for June 17 at 3:30 p.m. and requested that both Levenson and Rivers attend. Rivers did not appear, and at 5:05 p.m. the court summoned Levenson into chambers and advised him that "you are still in the case." (Tr. of June 17, 1977 at 2). Levenson then requested an adjournment, stating "I anticipate your decision, but I make the request anyway." (*Id.*) Judge Carter denied the request.

On the morning of trial, Levenson advised Judge Carter that Rivers had been retained by Crutch and was due to appear at 9:30 a.m. (Tr. 2). Rivers arrived at 10:20 and requested an adjournment of the trial. Judge

Carter stated that he had no objection to Rivers appearing on Crutch's behalf, but that he would not adjourn the commencement of trial. At that point, Rivers withdrew. (Tr. 15-18).

Later that morning, before the jury was chosen, Crutch addressed the Court and again requested an adjournment. He stated that Levenson had not had sufficient time to prepare for trial and complained that Levenson had visited him in the Metropolitan Correctional Center on only five occasions, and that each visit lasted only 15 to 20 minutes. (Tr. 32-33). Judge Carter again refused to postpone the trial. Later, during a robing room conference, Levenson stated that Crutch's statement to the court was incorrect and that he had visited Crutch on approximately twenty occasions, and that these visits exceeded twenty minutes in length. (Tr. 39).

The decision whether or not to grant a continuance is one traditionally entrusted to the sound discretion of the trial judge; the only requirement is that the decision be reasonable. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. Hall*, 448 F.2d 114, 116 (2d Cir. 1971), *cert. denied*, 405 U.S. 935 (1972). Furthermore, this Court has often held that the right to counsel "cannot be . . . manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States ex rel. Baskerville v. Deegan*, 428 F.2d 714, 716 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970); *United States v. Llanes*, 374 F.2d 712, 717 (2d Cir. 1967).

Judge Carter did not abuse his discretion in denying Crutch's application for a continuance. This Court has looked to several factors in analyzing the reasonableness of a trial judge's decision on a request for a continuance. One factor that weighs heavily is whether the defendant

gave the Court any "substantial reasons" to justify the delay. *United States ex rel. Baskerville v. Deegan*, *supra*, 428 F.2d at 716-17; *United States v. Llanes*, *supra*, 374 F.2d at 717. Here, Crutch offered no substantial reasons whatever. The only reasons given were first, his recent retention of a new attorney, and second, the failure of his appointed counsel to prepare adequately. With regard to the first reason, Crutch had two months in which to retain counsel, and yet did nothing to secure counsel until the eve of trial. The second justification offered by Crutch was flatly contradicted by Levenson's statement to Judge Carter in the robing room that he had met with Crutch on at least twenty occasions. Although Levenson did state that he "could use" an additional week (Tr. 39), he did not represent to the Court that he was unprepared. See *United States v. Lewis*, 565 F.2d 1248, 1253 (2d Cir. 1977).

A second factor which this Court has considered is whether the defendant has suffered any prejudice from the denial of the continuance. *United States v. Rastelli*, 551 F.2d 902, 906 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3216 (1977); *United States v. Carroll*, *supra*, 510 F.2d at 511; see also *United States v. Lustig*, 555 F.2d 737, 744 (9th Cir.), *cert. denied*, 46 U.S.L.W. 3293 (1977). Here, no prejudice has been alleged because none was suffered. There has been no claim that Levenson's representation of Crutch was inadequate; see *United States v. Carroll*, *supra*, 510 F.2d at 511; *United States v. Simmons*, 457 F.2d 763, 764 (9th Cir. 1972). More importantly, the evidence of Crutch's guilt was overwhelming. It consisted, in essence, of the testimony of four accomplices who dealt directly with him, Abbott, Heitzner, Caro, and Anna George, as well as a Government informant, Stephen Rowe. Further, Crutch's fingerprints were found on several highly incriminating pieces of evidence, including a genuine Barclays Bank check from which all of the copies were probably made, and several checks in the package of 100 Bankers Trust

checks sold to Michael Zilberberg and eventually recovered in Washington, D.C. Crutch's involvement in the Zilberberg sale, the largest transaction proven at trial, was further demonstrated in three tape recorded conversations between Crutch and Zilberberg in which the sale was discussed. Finally, Crutch's role in the manufacture and distribution of the checks was confirmed by the testimony of Bas, who printed the checks at his request. There was little that any lawyer, no matter how skilled or how thoroughly prepared, could have done to overcome this mass of evidence. This Court has found that the weight of the Government's evidence is a critical determinant in any analysis of prejudice suffered by the denial of a continuance. *United States v. Carroll, supra*, 510 F.2d at 511. It is plain that no continuance would have availed Crutch here.

The Government is aware of no case in this Circuit in which the denial of a continuance under similar circumstances has been held to be reversible error. Indeed, no such cases are cited in Crutch's brief. Several recent decisions have upheld the denial of a continuance where a defendant had less notice of the trial date and hence less time to retain a lawyer than Crutch did. In *Ungar v. Sarafite, supra*, 376 U.S. at 590, the defendant had five days' notice of the trial date and the trial judge denied a request for a one week adjournment. The Supreme Court held that five days was not a "constitutionally inadequate" time to hire counsel and prepare for trial. In *United States v. Carroll, supra*, 510 F.2d at 510, the defendant had twenty-one days to hire a lawyer after the lawyer who had previously represented him became unavailable. This Court found that to be a reasonable period of time. In *United States v. Hall, supra*, 448 F.2d at 116-17, a defendant had twelve days to hire a new lawyer, a period this Court also deemed reasonable. The Court added: "a defendant waives his right to have counsel of his own choice by failing to retain an attorney within a reasonable time." 448 F.2d at 117. If that observation applied

to Hall, who had twelve days, it applies *a fortiori* to Crutch, who had two months.

In view of the generous period allotted to Crutch to retain counsel, the extreme tardiness of his request for an adjournment, and the failure of his newly retained lawyer to attend a pretrial conference or to appear punctually on the day of trial, Judge Carter's denial of a continuance was eminently reasonable.

POINT II

The Evidence Against Eugene Crutch Was Sufficient.

Eugene Crutch's sole claim on this appeal is that the evidence against him on both the conspiracy and the substantive counts was insufficient. This argument, which pays scant attention to the record, is baseless.

Eugene Crutch was convicted on the only two counts in which he was named: Count One, the conspiracy count, and Count 29, which charged interstate transportation of a stolen motor vehicle. The automobile in question was the Lincoln Continental which Lloyd Williams purchased from Daniel Henderson with a counterfeit Barclays Bank check.

There can be no question whatever about the sufficiency of the Government's evidence on the substantive count. The Government's case was based on the testimony of three witnesses: Suzan Abbott, Lloyd Williams, and Theodore Mellor. Williams testified that Eugene Crutch met him at a bar and offered him employment. The first task Crutch gave him was the purchasing of Henderson's Continental, which had been advertised for sale in a newspaper. Williams further testified that he received from Eugene Crutch the counterfeit check used to pur-

chase the car, and that Eugene Crutch accompanied him to New Jersey when he attempted to sell it. (Tr. 822-37) Abbott testified that Eugene Crutch had approached her in mid-December, 1975, and had asked her for a check with which to purchase an automobile. Abbott gave him the Barclays check that was then passed on to Williams. (Tr. 252-57). Finally, Mellor, a Newark policeman, testified that he arrested Eugene Crutch and Williams in the Continental on December 31, 1975 while Williams was trying to sell it. Eugene Crutch, who was driving the car, accelerated as soon as he saw Mellor's *unmarked* car approaching and was caught only after a three block chase. (Tr. 850-59). All of this establishes beyond question that Eugene Crutch devised the scheme to defraud Henderson of his automobile and to dispose of it in New Jersey, as charged in Count 29.

The evidence is also more than sufficient to establish Eugene Crutch's membership in the conspiracy. Although he was not involved in the conspiracy at its inception, it is settled law that a coconspirator may join a conspiracy at any point during its existence. *United States v. Guillette*, 547 F.2d 743, 751 (2d Cir. 1976), *cert. denied*, 46 U.S.L.W. 3216 (1977). The record contains evidence of his involvement in two transactions other than the purchase of the Henderson Continental. When Elie Nicoleau encountered difficulty in purchasing the Cadillac from Michael Kalimian, Abbott called Eugene Crutch for assistance. Eugene Crutch met Nicoleau at Kalimian's residence and assisted him in disposing of the car that evening. (Tr. 233-36). Evidence was also offered that in August, 1975, Isiah Crutch, Abbott, Heitzner, and Hee Soo Kim traveled to California. Eugene Crutch met Isiah Crutch in a Los Angeles hotel and, according to Abbott, they had an extensive conversation concerning Isiah Crutch's "business." While the four were in California, they used counterfeit checks to make several purchases of foreign currency from various banks. (Tr. 177-81). Eugene Crutch's involvement in these two in-

cidents, together with his direction of the purchase of Henderson's car, clearly establishes his membership in the conspiracy charged in Count One. The argument in his brief addressed to the conspiracy count (Br. 8-15) makes no mention of the Henderson purchase and appears to assume that this evidence cannot be considered in evaluating the sufficiency of the evidence on the conspiracy count. Overt acts 77-79 enumerated in the conspiracy count describe the Henderson transaction, and the jury was certainly entitled to consider this evidence on the conspiracy as well as the substantive count.

Implicit in Eugene Crutch's argument here is the so-called "single transaction rule", which holds that a single isolated act will not, standing alone, support the conclusion that a defendant had knowledge of or participated in a larger conspiratorial scheme. However, this doctrine has force only when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which knowledge might be inferred. *United States v. Agueci*, 310 F.2d 817, 836 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). See also *United States v. Magnano*, 543 F.2d 431, 434 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *United States v. LaVecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975); *United States v. Torres*, 503 F.2d 1120, 1123-24 (2d Cir. 1974).

Eugene Crutch's awareness of the broader conspiracy was firmly established, first, by evidence of his meetings and discussions with Isiah Crutch in California and of the assistance lent to Abbott and Nicoleau in purchasing the Kalimian Cadillac. It was further established by his ability to accomplish the Henderson purchase by going to Suzan Abbott and simply asking her for a check with which to purchase a car. The jury could fairly conclude that Eugene Crutch would not have had the tools of the

conspiracy so readily available to him unless he was a knowing member of the overall scheme.

POINT III

The Denial of Bas' Motion for a Severance Was Not an Abuse of Discretion.

Bas claims that Judge Carter erred in denying his motion to be tried separately from Isiah Crutch. Bas first made this motion on June 3, 1977; he argued, in essence, that Crutch would testify on his behalf and exculpate him if he were tried separately. In support of the motion he offered only an affidavit from his counsel, which related conversations with Crutch's counsel. (Appendix of Defendant-Appellant Bas at 26-28). Judge Carter denied the motion by endorsement dated June 20, 1977. (*Id.* at 29). Bas renewed the motion on the first day of trial, this time proffering an affidavit from Crutch. (*Id.* at 30-31). Judge Carter again denied the motion.

The determination of a motion for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure is ordinarily within the sound discretion of the district judge. *Opper v. United States*, 348 U.S. 84, 95 (1954). The defendant seeking a severance bears the "heavy burden" of demonstrating prejudice in a joint trial. *United States v. Lord*, 565 F.2d 861 (2d Cir. 1977). In evaluating another claim that severance was improperly denied, this Court has recently stated:

"The determination of the elusive criterion of prejudice rests in judicial discretion at the trial level, and is virtually unreviewable. . . . While we do not shirk our responsibility of review, we are reluctant to overturn a conviction for denial of a motion for severance unless there is a showing of

substantial prejudice. *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975). It is not sufficient merely to show that the accused would have had a better chance for acquittal at a separate trial. *United States v. Corr*, 543 F.2d 1042, 1052 (2d Cir. 1976). . . .” *United States v. Stirling*, Dkt. No. 77-1140, slip op. 1401, 1450 (2d Cir., Feb. 2, 1978).

In *United States v. Finkelstein*, 526 F.2d 517, 523-25 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), this Court held that in passing upon a severance motion where exculpation by a co-defendant is claimed, the trial judge should consider:

“(1) the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege, . . . (2) the degree to which the exculpatory testimony would be cumulative . . . (3) the counter arguments of judicial economy, . . . and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment.” 526 F.2d at 523-24.

See also *United States v. Taylor*, 562 F.2d 1345, 1362 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977).*

* None of the cases on which Bas relies is from this Circuit, and all embrace standards for determining severance motions quite different from those articulated in *Finkelstein*. In *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965), the Seventh Circuit disregarded at least two elements of the *Finkelstein* test. First, the defendant did not demonstrate conclusively that the co-defendant whom he sought to call as a witness would waive his Fifth Amendment privilege. 352 F.2d at 898. Second, the Court attached no weight whatever to the susceptibility of this witness' testimony to impeachment; it held that the defendant was entitled to call him “regardless of how we might regard the credibility of that witness or the weight of his testimony.” 352

[Footnote continued on following page]

Before proceeding to apply the *Finkelstein* standard to the present facts, we note that Judge Carter was justified in denying the motion solely because it was untimely. At the pretrial conference on April 21, 1977, Judge Carter directed that all motions be filed by April 26. (Tr. of April 21, 1977 at 3). Bas' severance motion was filed June 3, 1977 and was accompanied by a patently inadequate affidavit from his counsel. An affidavit from Crutch, whose testimony he claimed would exculpate him, was not filed until the morning of trial, June 20, 1977. (Tr. 8). The timeliness of the motion is a relevant consideration in determining whether the district judge properly exercised his discretion, see *United States v. Taylor*, *supra*, 562 F.2d at 1362. Bas' motion was not fully submitted until two months after the deadline for motions had passed, on the day when Judge Carter was about to empanel the jury and begin the trial. No reason has been suggested by Bas for this extraordinary lateness.

Of the four criteria set forth by this Court in *Finkelstein*, Bas has met only the first: Crutch's affidavit did state that he would testify at a severed trial and waive his Fifth Amendment privilege. Bas does not come close to meeting any of the other three criteria, and the discuss-

F.2d at 898. *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971) simply follows *Echeles*, and imposes no requirement that the moving defendant show that his potential witness will waive his Fifth Amendment privilege. It requires only that there be a "reasonable probability" that the witness will testify. 454 F.2d at 778. *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973) follows the test for determining severance motions set down in another Fifth Circuit case, *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970). That test, set forth at 486 F.2d at 22, ignores three of the four elements of the *Finkelstein* standard: it requires no showing that the witness will waive his Fifth Amendment privilege, and does not consider whether the proposed testimony is cumulative or whether it is vulnerable to impeachment. In sum, all of these cases precede *Finkelstein*, and none of them applies its standards. They offer Bas little, if any, assistance.

sion of the *Finkelstein* standard in his brief, which consumes slightly more than one page (Br. 4-5), says much by its brevity.

Considerations of judicial economy militated strongly against severance. Bas and Crutch were the only defendants named in all 29 counts of the indictment. The trial was a lengthy one, in which the Government called over 30 witnesses and introduced over 230 exhibits. A severance would have required expenditure of an additional two weeks of trial time. In *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971), on which Bas relies, the Court noted that "severance would only have required two relatively uncomplicated trials in place of one—not an undue burden from the viewpoint of judicial administration." 454 F.2d at 777, n.5. Duplicating this trial would have imposed a substantial burden, and Judge Carter was certainly entitled to take that into consideration.

Another among the *Finkelstein* criteria that counts heavily against Bas is the degree to which the proposed exculpatory testimony would have been cumulative. Crutch's proposed testimony was *entirely* cumulative; it amounted to nothing more than repetition of the story Bas told in his trial testimony. Nowhere in his brief does Bas suggest that Crutch would have added any facts not already placed before the jury by Bas. Thus, the denial of the severance motion did not prevent Bas from placing in evidence any facts tending to exculpate him. It simply prevented him from subjecting the jury to a repetition of a story which Judge Carter quite emphatically characterized as incredible at the time of Bas' sentence. (Tr. of July 27, 1977 at 13-14). In *Finkelstein*, this Court affirmed the district court's denial of severance motions precisely because the proposed testi-

mony was merely cumulative. This Court's observation there is equally applicable here:

"While the repetition of such testimony might have increased the likelihood that it would be believed, the fact remains that the expected testimony as to Scardino [the moving defendant] would have been almost entirely cumulative." 526 F.2d at 524.

The final factor sets forth in *Finkelstein* is by far the most damaging to Bas' cause: the extent to which the proposed testimony would have been subject to impeachment. Isiah Crutch was a witness whose credibility was subject to serious question. Judge Carter characterized him as "one of the most amoral and vicious criminals that has come before me." (Tr. of July 27, 1977 at 14). Fraud and deceit were the very essence of the crimes he orchestrated. An early example of his veracity can be found in the opening moments of the trial: in seeking an adjournment he told Judge Carter that his lawyer had visited him on only four or five brief occasions. (Tr. 33). His lawyer then told Judge Carter in the robing room that he had twenty meetings with Crutch, many of them lengthy. (Tr. 39). Moreover, Crutch has an extensive criminal record; in addition to his conviction on 27 counts of the present indictment, he was convicted of mail fraud before Judge Pollack in the Southern District of New York in August, 1975. Highly indicative of Crutch's respect for the legal process—and fair game for impeachment should he have testified—is the fact that Crutch was under indictment, on trial, and awaiting sentence on that earlier case while he was committing the crimes for which he was convicted here.

Finally, Crutch's exculpation of Bas was flatly contradicted by other testimony offered by the Government. Suzan Abbott testified that she met frequently with Bas in February, 1976, that he printed checks for her, and that

he at all times appeared knowledgeable about Crutch's fraudulent schemes. (Tr. 241-52). Even more significantly, Abbott testified that Crutch instructed her on the steps necessary to gain Bas' confidence and to convince him that she was "sent by Ike." (Tr. 242). Abbott never testified that Crutch informed her that Bas was unaware of the uses to which his checks were being put on that he was an unwitting dupe and should be treated accordingly.

The vulnerability of a witness' testimony to impeachment is a factor which weighs heavily in the determination of a severance motion. In *United States v. Taylor, supra*, Taylor sought a severance, claiming that Robinson, a co-defendant, would exculpate him. In affirming the denial of the severance motion, this Court observed:

"Moreover, Robinson's conviction in *United States v. Tramunti* and his then-anticipated conviction for the conspiracy charged in this indictment would have subjected his testimony to significant impeachment, especially since his testimony would have flatly contradicted substantial other evidence of Taylor's involvement in the conspiracy." 562 F.2d at 1363.

These observations apply equally to Crutch and demonstrate forcefully how far short of the *Finkelstein* standard Bas falls.

Bas has failed to demonstrate, either here or in the district court, how he was prejudiced by the denial of the severance motion. He is unable to make such a demonstration, we submit, because the evidence of his guilt was substantial, and consisted not merely of the testimony of accomplices but of undisputed documentary evidence. Abbott, of course, testified that Bas was fully familiar with Crutch's operation, that she discussed this operation with him, and that Bas continued to print

checks for her even after she informed him that Crutch was in jail. Even putting Abbott's testimony aside, the circumstantial evidence of Bas' guilty knowledge was compelling. As Bas himself conceded, he began printing checks for a man who simply walked into his shop unannounced one day. This man, whom Bas stated he assumed to be a printing salesman, showed him no identification and had no office, only an answering service. Furthermore, despite his affluent appearance, he had no employees and ran all errands himself. This man paid Bas exclusively in cash; Bas gave him no receipts or invoices. When Bas' office was searched by agents, not a scrap of paper was found reflecting Bas' dealings with Crutch, even though Bas maintained customer files dating back to 1972.

Moreover, neither the quantity of checks ordered by Crutch nor the price paid suggested an orthodox transaction between printer and broker. Crutch asked for checks in quantities of 5, 10 and 15; Bas conceded that the smallest order he had filled theretofore was for 500 checks. Bas stated that Crutch informed him that he was preparing "samples" in an attempt to solicit business from banks. It is incredible enough that someone without an office, a business card, or an employee would suddenly be soliciting business from the First National City Bank, Bankers Trust Company and Barclays Bank, among others. Bas' testimony on this point, however, was completely undermined by the testimony of the Government's rebuttal witness, an employee of DeLuxe Check Printers. He stated that whenever sample checks were presented to a bank, they were conspicuously stamped "void", "specimen", "sample", or "proof." (Tr. 1400-01). According to his testimony, Bas had held jobs with nine different printing companies prior to opening his own shop. (Tr. 1243-47). Thus he hardly could have been unaware of the safeguards employed when specimen checks were submitted to banks. Finally, the price Bas was paid for his work was outlandishly disproportionate to its market

value. According to Abbott, Bas printed 20 personal checks on the account of Catherine Marstairs and, after she had defrauded the Morgan Guaranty Trust Company, she paid him \$500. According to the DeLuxe employee, an order of 200 personal checks costs \$2.80.

The most damning evidence against Bas was contained in the checks which Bas admitted having printed. Some checks bore the legend "DeLuxe Check Printers" (GX 165), others "Rudco Checks" (GX 204, 206, 218, 219), and one indicated that it was printed by "The Reynolds & Reynolds Co., Celina, Ohio." (GX 124). This evidence totally undermined Bas' claim that he was simply performing work for a printing salesman; if he had been, he would scarcely have put the names of various prominent check printing companies on his checks. Rather, this makes clear that Bas was simply duplicating whatever Crutch presented to him, and trying to achieve the closest possible resemblance to genuine checks. No explanation was even attempted by Bas for the appearance of these names on the checks.*

Several other facts pointed to Bas' knowledge of wrongdoing and his intimate involvement in Crutch's conspiracy. As Bas admitted on cross examination, he used the code name "PX" to call Crutch on his "beeper." The records of the beeper service (GX 118-120, 239-243)

* The checks provide further evidence of Bas' guilt. Bas testified that he printed Morgan Guaranty personal checks for Abbott. He also insisted that he numbered all checks consecutively, in accordance with instructions given him by Crutch or Abbott. He further insisted that he never placed the same number on more than one check. (Tr. 1325). The Government introduced a packet of eight Morgan Guaranty checks numbered as follows: 1134, 1135, 1136, 1137, 1134, 1135, 1136, 1137 (GX 216). If Bas thought that he was printing a packet of checks for personal use, he would not have duplicated the check numbers.

indicated that there were 75 telephone calls from "PX" to Crutch in a six month period in 1975. Crutch received calls on his beeper from many individuals who took no part in his criminal activities; most of them left messages in their true names. Thus, the use of a code name by Bas—a practice he shared with Abbott, Heitzner and Caro—strongly suggested that he knew that he was engaged in more than an ordinary business venture.

Finally, Bas admitted lying to FBI agents when he stated that he was unable to recall printing Bankers Trust Company checks. (Tr. 1303-04). Because Bankers Trust checks were used with great frequency by Crutch, and were the subject of the single largest transaction in which Crutch engaged, Bas' lies are highly probative of his guilty knowledge.*

The foregoing review of the evidence demonstrates that Crutch simply could not have exonerated Bas; the undisputed documentary evidence against Bas was virtually irrefutable.** In *United States v. Stirling*, *supra*, this court held that a district judge's decision on a severance motion is "virtually unreviewable." Judge Carter sat through a two week trial and heard Bas' testimony, which covered approximately 150 pages of the trial transcript. At the time of sentence, he stated to Bas: "I thought you lied on the stand. . . . I have no belief in anything you said. It is incredible to me that

* Also probative of Bas' criminal intent is the undisputed evidence that he had printed a \$20 bill and, according to Abbott, was looking for the proper paper to print large quantities of bills.

** After the verdict, Bas' counsel, without securing the trial court's permission, interviewed three jurors and then submitted an affidavit to Judge Carter stating that these jurors would have acquitted Bas had Crutch testified on his behalf. This evidence is clearly incompetent. *United States v. Green*, 523 F.2d 229, 235 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Crosby*, 294 F.2d 928, 948-49 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962).

you could even have made the statements you did on the stand and that you indicate now that you were innocent." (Tr. of July 27, 1977 at 14). Judge Carter's analysis of the evidence is entitled to great weight here, and compels the conclusion that the prejudice to Bas from the denial of his severance motion was minimal.

POINT IV

The Evidence Was Sufficient to Establish That Bas Was a Knowing Member of the Conspiracy.

Bas claims that although he was concededly the printer of Crutch's checks, the Government failed to demonstrate that he had any knowledge of the uses to which the checks were put. The argument ignores the substantial evidence of Bas' guilt adduced at trial and the inferences that the jury was entitled to draw therefrom.

In evaluating Bas' claim, the evidence must be viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), and due deference must be paid to the jury's right "to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact." *United States v. Greenberg*, 534 F.2d 523, 524 (2d Cir.), *cert. denied*, 429 U.S. 831 (1976). At trial, it was established beyond cavil that Bas printed a vast variety of counterfeit checks for Crutch. The evidence that he was knowingly engaged in making counterfeit copies of genuine obligations was overwhelming, and the jury by its verdict rejected his defense that he thought he was doing legitimate work for a printing salesman. As we have already demonstrated in Point III, *supra*, the checks Bas printed were obviously intended as counterfeits: many had duplicate rather than consecutive numbers, and several bore the trademarks of large and well known check printing companies, such as DeLuxe or Rudco. Further, Bas' awareness that Crutch was engaged

in an illegal enterprise was demonstrated by the clandestine nature of his dealings with Crutch.

Bas is therefore reduced to arguing that although he knew that he was supplying Crutch with counterfeit checks, he didn't know precisely what Crutch was doing with them. The contention is inherently implausible. Counterfeit checks have no wider a variety of uses than counterfeit currency; with each, the only purpose to which they can be put is to defraud others of goods or services by tendering those obligations as payment. That, of course, is precisely what Crutch did here. In any event, there was ample evidence in the record that Bas was well aware of the uses to which his checks were put, and that Crutch never concealed these from him. This awareness was demonstrated in the testimony of Suzan Abbott, who met with Bas in February, 1976 after Crutch was incarcerated. Abbott had never before met Bas, and she needed his help in printing a quantity of checks. Before she met Bas, Crutch advised her that Bas would do the required work for her only if he could be assured that she was "from Ike." (Tr. 242-43). Abbott could gain Bas' confidence, Crutch advised, if she demonstrated a familiarity with the crimes Crutch had committed in the past year. (Tr. 389). When Abbott first met Bas, therefore, she engaged him in a discussion of the past year's transactions, and the uses of Bas' checks: "we talked about the different checks, the ones that had worked, the ones that didn't work" (Tr. 246); "[we discussed] the different episodes, the different checks, the coin companies." (Tr. 393-94). Furthermore, they discussed Crutch at great length, and his role in the passing of the checks; they talked about "how Ike was very positive in every transaction that had gone down." (Tr. 246). Moreover, when Bas printed a set of checks for Abbott and gave them to her, he was not paid immediately, nor did he tender her a bill; he was only paid after Abbott used one of his checks to defraud the Morgan

Guaranty Trust Company. (Tr. 248-52). From this method of payment the jury could properly conclude that Bas was paid not according to the work he performed but according to whether or not the transaction that made use of his checks succeeded.

One further piece of evidence pointed to Bas' knowledge of Crutch's schemes. After Bas' arrest on April 12, 1977, he was interviewed by the FBI and shown a variety of checks recovered during the course of the investigation. When he was shown the Bankers Trust checks, he stated that he did not recognize them and did not recall printing any such checks (Tr. 972). As Bas admitted during his testimony, this was a lie. (Tr. 1303). Bankers Trust checks were used in several of Crutch's transactions including the single largest one, the sale of the \$1,750,000 in official checks. Judge Carter quite properly charged the jury that false exculpatory statements "are circumstantial evidence of guilty consciousness." (Tr. 1691). There would have been no reason for Bas to avoid any mention of Bankers Trust checks while willingly acknowledging the use of others, unless he knew that those checks had been used in substantial crimes. Significantly, Bas was convicted only on counts that involved the use of Bankers Trust checks: the purchase of the Slobodien Mercedes (Counts 15 and 16); the sale of the 100 official checks to Zilberberg (Count 17); the purchase of the Rusonik Rolls Royce (Counts 25-27).

The evidence thus adequately demonstrated not merely that Bas knew that he was supplying Crutch with counterfeit checks, but that he knew in some detail what use Crutch was making of them. Abbott's testimony that she reviewed Crutch's transactions with Bas is sufficient to establish that. Bas' argument that he had no knowledge of the transactions is thus refuted by the record. It is also legally deficient. A member of a conspiracy need not know the details of all crimes committed

pursuant to the conspiracy; he need only know the purposes of the conspiracy and in some way associate himself with it. *United States v. Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). Bas' liability for the substantive offenses is equally apparent. A person who has joined a conspiracy can be held liable for the substantive offenses committed in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946). The Government need only demonstrate that "the defendant had some reason to believe that the conspiracy was broad enough to encompass those acts." *United States v. Iannelli*, 461 F.2d 483, 487 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972).^{*} By the very nature of the items he printed Bas had to know that other individuals would be involved in passing the checks and in obtaining and selling the merchandise purchased thereby. Furthermore, Abbott's testimony of her discussions with him made clear that he did in fact know the extent of the conspiracy.^{**}

^{*} The failure of the district court to present the case to the jury on a *Pinkerton* theory does not prevent the conviction from being upheld on *Pinkerton* grounds so long as the facts support its application. In *United States v. Jackson*, 560 F.2d 112, 121 (2d Cir. 1977), this Court upheld the defendant's conviction on a *Pinkerton* theory even though Judge Mishler, trying the case without a jury, made no mention of *Pinkerton* in his findings of fact and conclusions of law. *United States v. Jackson*, 435 F. Supp. 434 (E.D.N.Y. 1976). See also *United States v. MacDougal-Pena*, 545 F.2d 833, 835 (2d Cir. 1976). Bas' conviction on the substantive counts is equally sustainable on an aiding and abetting theory. *United States v. Jackson*, *supra*, 560 F.2d at 121; *United States v. MacDougal-Pena*, *supra*, 545 F.2d at 835.

^{**} Compare *United States v. Mattia*, 379 F.2d 725 (3rd Cir.), *cert. denied*, 389 U.S. 846 (1967), in which those involved in the mechanics of printing counterfeit bonds were found to be knowing members of a conspiracy to transport them across state lines even though they had far less detailed knowledge of the uses of their product than Bas did.

Bas places unwarranted reliance on this Court's opinion in *United States v. Gallishaw*, 428 F.2d 760 (2d Cir. 1970), in which it was held that a person who lent a machine gun to others with knowledge only that it would be used for some illegal purpose could not be found guilty of bank robbery when those individuals later robbed a bank. The basis for reversal in *Gallishaw* was the trial judge's charge that the jury need only find that the defendant lent the gun with knowledge that it would be used to violate the law. The present case bears no resemblance to *Gallishaw*. Judge Carter properly charged the jury on the alleged objects of the conspiracy and the requirement that each defendant be aware of these objects. He set forth clearly each of the four objects of the conspiracy, namely, wire fraud, interstate transportation of stolen motor vehicles, interstate transportation of stolen property, and interstate transportation of forged and counterfeited securities. (Tr. 1645-46). He further charged the jury that

"To conclude that a defendant was a member of a conspiracy you must find that he knew the unlawful purpose of the alleged conspiracy, that knowing the purpose he intentionally joined in the endeavor, and that he had an interest in making it succeed." (Tr. 1651).

By its verdict, the jury made those findings with respect to Bas.

This case is controlled not by *Gallishaw* but by *United States v. Calabro*, 467 F.2d 973, 982 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973), which carefully qualifies *Gallishaw's* holding. *Calabro* involved a conspiracy to forge and utter stolen United States savings bonds and postal money orders. One defendant, Tortorello, did nothing but supply false identification to the members of the conspiracy for use in the forging of bonds and money orders. On appeal, he claimed

that although he supplied this false identification, he had no knowledge of the use to which it would be put. The trial court properly instructed the jury that it had to find that the defendant knew that he was acting in furtherance of the objects of the conspiracy, the cashing of bonds and money orders. This Court found that there was sufficient evidence in the record that Tortorello knew that he was assisting in the cashing of illegal obligations, and that the existence of such evidence distinguished the case from *Gallishaw*. 407 F.2d at 982.

The facts here are far more compelling than those in *Calabro*. Like *Calabro*, and unlike *Gallishaw*, the jury was properly instructed on the requisite level of intent. Although Bas, like Tortorello, was essentially a supplier of a commodity to the other conspirators, the commodity he supplied was the basis of the conspiracy. Tortorello's function merely furthered the ends of the conspiracy, but was not essential to it. Finally, while Tortorello merely had a general idea that his materials were being used to cash forged obligations, Bas knew specifically what uses were being made of his checks and what they were being used to purchase. If the evidence against Tortorello was sufficient, it is more than adequate against Bas. See also *United States v. Kilcullen*, 546 F.2d 435, 445-47 (1st Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).*

Finally, as a "post script" Bas argues that he is entitled to a reversal because Judge Carter stated, during Bas' argument for a judgment of acquittal, that a reasonable doubt existed as to Bas' guilt. (Tr. 1160). The

* Bas also cites *United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977) in support of his argument that he lacked the requisite conspiratorial intent. In *Rosenblatt* the conviction was reversed because there was no agreement between the conspirators as to the purpose of the conspiracy; each thought he was agreeing to commit a different crime. There were no comparable misunderstandings between Bas and Crutch, and the case is thus inapplicable.

statement has been wholly misconstrued. It is abundantly clear that Judge Carter meant nothing more by it than that all defendants remained cloaked in the presumption of innocence until the jury found them guilty.* The statement cannot be read as an expression of doubt as to Bas' guilt. Judge Carter quite evidently entertained no such doubts, for he stated to Bas at the time of sentence, "it is incredible to me that you could even have made the statements you did on the stand and that you indicate now that you were innocent. I can't believe that." (Tr. of July 27, 1977, at p. 14).

POINT V

Bas Was More Than A Supplier of Lawful Goods and Services to Crutch.

Bas' final argument is that even if it is assumed that he knowingly supplied counterfeit checks to Crutch, that

* Bas fails to point out that Judge Carter later supplemented his remarks on Bas' motion with the following statement:

"As I understand it, the Court is in a position where it has to determine if there is no evidence in the record upon which a jury could reasonably conclude guilt beyond a reasonable doubt. If so, it must take the case from the jury and enter a judgment of acquittal.

However, if the Court concludes that the evidence is such that a reasonable-minded jury could have a reasonable doubt or could not have a reasonable doubt, then it is a case for the jury.

And I find that it is the latter case. It is clear, obviously, that the jury doesn't have to believe any of the testimony thus far adduced and could acquit. But it is also clear that they have sufficient evidence that a fair-minded jury could find guilt beyond a reasonable doubt. And so the motion is denied." (Tr. 1191)

Judge Carter's formulation of the applicable legal standard was entirely correct. *United States v. DeGarces*, 518 F.2d 1156, 1159 (2d Cir. 1975); *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972).

evidence is insufficient for conviction. He relies for this argument exclusively on *United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). *Falcone* held that one who supplied goods "in themselves innocent" to another with knowledge that the goods would be used for unlawful purposes was not guilty of the crimes these goods were used to commit. Bas argues that his situation is precisely that of the defendant in *Falcone*, who supplied sugar to the operator of an illicit still, and that he is entitled to a reversal. Not only is the analogy flawed, but Bas ignores the numerous cases that have modified and limited *Falcone* in the 38 years since it was decided.

As Bas recognizes, the Supreme Court in *Direct Sales Co. v. United States*, 319 U.S. 703 (1943) substantially modified *Falcone* by limiting its application to suppliers of commodities that "were articles of free commerce . . . not . . . incapable of further legal use." 319 U.S. at 710. The Court further observed that "[a]ll articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use." *Id.* In this Circuit, *Falcone* has been held "limited . . . to its strict facts," *United States v. Tramaglino*, 197 F.2d 928, 930 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952), and this Court has repeatedly declined to extend it. See *United States v. Campisi*, 306 F.2d 308, 310 (2d Cir.), *cert. denied*, 371 U.S. 920 (1962); *United States v. Piampiano*, 271 F.2d 273, 274 (2d Cir. 1959); see also *United States v. Chamley*, 376 F.2d 57, 59-60 (7th Cir.), *cert. denied*, 389 U.S. 898 (1967).

The courts that have distinguished *Falcone* have looked to several pronounced differences between that case and the cases before them. First, they have considered whether the defendant in question was supplying goods "in themselves innocent." *Direct Sales Co. v. United States*, *supra*, 319 U.S. at 710; *United States v. Campisi*, *supra*, 306 F.2d at 311. Second, they have considered

whether the supplier had a stake in the ultimate unlawful venture, that is, whether payment for the goods was contingent on the successful commission of crimes. *United States v. Campisi, supra*, 306 F.2d at 311; *United States v. Chamley, supra*, 376 F.2d at 59-60. Third, the courts have considered the extent to which the sales departed from the seller's ordinary course of business. As this Court has stated, "any deviation from the strict facts of *Falcone*, even a lawful departure from the normal course of business or cooperation in concealing delivery, is sufficient to connect the vendor with the criminality of the vendee." (Italics in original) *United States v. Campisi, supra*, 306 F.2d at 311; see also *United States v. Piampiano, supra*, 271 F.2d at 274; *United States v. Tramaglino, supra*, 197 F.2d at 928.

Bas' conduct clearly falls outside the strict facts of *Falcone*. First, he was not a purveyor of goods "in themselves innocent"; he was selling counterfeit checks, which could only be used to defraud. In *United States v. Chamley, supra*, 376 F.2d 57, a case remarkably similar to this one, the defendant supplied blank checks and money orders to a group that later forged and cashed them. He too argued that *Falcone* exonerated him. The Seventh Circuit observed that "the items sold by the defendant, unlike those involved in *Falcone*, were for all practical purposes incapable of being put to a lawful use." 376 F.2d at 59. Second, Bas' compensation did depend on the successful passing of his checks. When he gave Suzan Abbott the 20 Morgan Guaranty checks, she did not pay him until one of the checks had been used to defraud the bank of \$6,000. Third, Bas' activities were a radical departure from his ordinary business practices. He had never before printed cashier's checks (Tr. 1335-36). He was paid exclusively in cash, tendered no receipts or invoices to his customer, and kept no records whatever of these transactions. Even Bas admitted on cross examination that this was not the way

he ordinarily conducted his business. (Tr. 1322). The reasoning of the cases that have construed *Falcone* requires that his conviction be affirmed.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jersey G. Epstein being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

(two) That on the 6th day of March, 1978
he served 2 copies of the within brief
by placing the same in a properly postpaid franked
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William L. Richman, Esq.
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David Blackstone, Esq.
401 Broadway
New York, NY 10013

Lee R. Miller, Esq.
585 West End Avenue
New York, NY 10024

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
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of New York.

Jersey G. Epstein

Sworn to before me this

6th day of March 1978

Gloria Meyer

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Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979